

Campbell, M. (2018) Equity flailing? Against ad hocery in unjustified enrichment. *Edinburgh Law Review*, 22(3), pp. 393-398. (doi: [10.3366/elr.2018.0507](https://doi.org/10.3366/elr.2018.0507)).

This is the author's final accepted version.

There may be differences between this version and the published version. You are advised to consult the publisher's version if you wish to cite from it.

<http://eprints.gla.ac.uk/169624/>

Deposited on: 13 February 2020

Enlighten – Research publications by members of the University of Glasgow
<http://eprints.gla.ac.uk>

Equity flailing? Against ad hocery in unjustified enrichment

This note examines the Outer House case of *Advocate General for Scotland v John Gunn and Sons Ltd*.¹ It relates briefly the facts and result, then addresses two points: the general approach to unjustified enrichment, and the role of equity in that area.

Under the Finance Act 2001, the United Kingdom levied the commercial exploitation of quarried shale and spoil. Some undertakings were exempted from the levy, including the defender. In 2013, the European Commission determined that the exemptions from which the defender benefitted constituted unlawful state aid under articles 107-108 of the Treaty on the Functioning of the European Union. The Crown sued to recover the advantage obtained by the defender in the form of the exemption: it had to restore the market.

The Lord Ordinary (Uist) decided quantum in the Crown's favour, rejected John Gunn's defences, and granted decree based on the applicable European Union legal regime. However, the Court did not favour the Crown's case on unjustified enrichment:

I do not know why the pursuer thought it either necessary or appropriate to include an alternative claim for unjust enrichment at common law [in] this action. [...] I see no good reason for the inclusion of a case based on unjust enrichment, which raises considerations of equity which do not arise in the claim based on EU law.²

This note will examine the unjustified enrichment aspect of the case.

A. UNJUSTIFIED ENRICHMENT AND EQUITY GENERALLY

"The precise contours of unjustified enrichment" in Scots law "remain to be mapped".³ But high authority establishes the fundamentals. In *Shilliday v Smith*,⁴ Lord Rodger said:

[A] person may be said to be unjustly enriched at another's expense when he has obtained a benefit from the other's actings or expenditure, without

¹ [2018] CSOH 39 (hereafter "*AG v John Gunn*").

² *AG v John Gunn*, para [60].

³ *Biffa Waste Services Ltd v Patersons of Greenoakhill Ltd* [2015] CSOH 137, para [29] per Lord Woolman. For modern developments, see HL MacQueen, "The future of unjustified enrichment in Scotland" [2017] RLR 14. As to structure, Scots enrichment law is widely considered to embrace three categories of enrichment claim based on the manner of enrichment: by (1) transfer (typified, for example, by *condictiones indebiti*, *ob turpem vel iniustam causam*, and *ob causam finitum*); (2) imposition (as where another's debt is paid); and (3) interference with rights (as where another's property is surreptitiously exploited). See, eg, the leading short account in HL MacQueen and Lord Eassie (eds), *Gloag & Henderson: The Law of Scotland* (14th edn, 2017) ch 24. Whilst enrichment by transfer may to a point be safe (following *Shilliday v Smith* 1998 SC 725), the master plan remains an academic roadmap to relevant concrete authority: R Evans-Jones, *Unjustified Enrichment*, Vol II (2013), para 1.52.

⁴ 1998 SC 725, 727 (Lord Kirkwood and Lord Caplan generally agreeing).

there being a legal ground which would justify him in retaining that benefit.

The significance of one person being unjustly enriched at the expense of another is that in general terms it constitutes an event which triggers a right in that other person to have the enrichment reversed.

And in *Morgan Guaranty Trust Co of New York v Lothian RC*,⁵ Lord Hope said that “once the pursuer has averred the necessary ingredients to show that *prima facie* he is entitled to [a] remedy, it is for the defender to raise the issues which may lead to a decision that the remedy should be refused on grounds of equity”.

Subsequently, in *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd*,⁶ Lord Hope mentioned whether “it would be equitable to compel the defenders to redress the enrichment” as something which *the pursuer* must show. But Lord Hope’s *Dollar Land* speech, taken as a whole, can be reconciled with the view expressed in *Morgan Guaranty*. We are told in *Dollar Land* that the correct approach to unjustified enrichment is “to identify the factors which are essential to the success of a case”; and that Lord Rodger in the Inner House was correct to say “that the pursuers must show that the defenders have been enriched at their expense, that there is no legal justification for the enrichment and that it would be equitable to compel the defenders to redress the enrichment.”⁷ Contradiction in Lord Hope’s thinking is discounted by this passage:⁸

[E]quitable considerations suggest that CIN should be subjected to the remedy of recompense unless the contract itself provides an answer to the claim that the enrichment was unjustified. It is on this point, the second in the list of factors, that DLC’s case seems to me to run into insuperable difficulty.

So his Lordship’s initial mention of equity in *Dollar Land* referred to *the conclusion* that one must reach when *two* “factors”, (i) enrichment at another’s expense, (ii) without justification, are established. This view is fortified by Lord Rodger’s speech in the Inner House in *Dollar Land*:⁹ his Lordship deduced *his* statement of principle from an observation by Lord Hope in *Morgan Guaranty*: unjustified enrichment claims “are all means to the same end, which is to redress an unjustified enrichment upon the broad equitable principle *nemo debet locupletari*

⁵ 1995 SC 151, 166 (Lord Mayfield and Lord Kirkwood agreeing).

⁶ 1998 SC (HL) 90, 99 (for the Appellate Committee).

⁷ *Ibid*, 99; citing 1996 SC 331, 353.

⁸ *Ibid*, 99-100.

⁹ 1996 SC 331, 353.

aliena jactura”.¹⁰ This final remark is the foundation for the other two. Unlocking it explains them in turn. It refers to the historic, equitable basis, of unjustified enrichment in Scots law¹¹ – the *normative* idea – that unjustified enrichment at another’s expense is inequitable. This is the only way to make sense of some key passages in foundational¹² cases.¹³ And it is different to Lord Hope’s statement in *Morgan Guaranty* (quoted above, and appearing ten pages further on in his opinion from the *nemo debet dictum*) that the defender addresses equity once the pursuer has established the defender’s unjustified enrichment at the pursuer’s expense. That was about introducing defences into the unjustified enrichment enquiry. This is a principal role in practice of equity in Scots enrichment law,¹⁴ and cases confirm this reading of *Morgan Guaranty*.¹⁵

B. UNJUSTIFIED ENRICHMENT AND EQUITY IN *JOHN GUNN*

Lord Uist said that the defender had been unjustifiably enriched at the Crown’s expense:¹⁶

[John Gunn] was clearly enriched to the amount of the Aggregates Levy which it should have paid but did not pay and this was at the expense of the Crown which did not receive payment of the levy. [...] I do not accept the submission for the defenders that the retrospecti[ve] classification of the exemption from the levy as unlawful did not render any benefits rendered under it at the time it was lawful unjustifiable at common law.

But then, his Lordship concluded against liability:¹⁷

The first defender did nothing that was considered to be wrong at the time the exemption was applied. It acted in accordance with the clear provisions of domestic law. It is correct to say that it had no responsibility for the retrospective classification of the shale exemption as unlawful. If the

¹⁰ 1995 SC 151, 155; referred to by Lord Hope himself in *Dollar Land* 1998 SC (HL) 90, 98.

¹¹ See *Shilliday* 1998 SC 725, 734 (Lord Caplan). See also Stair, *Institutions*, I, 7, 6.

¹² On the effect of *Morgan Guaranty*, *Shilliday*, and *Dollar Land*, see *Robertson Construction Central Ltd v Glasgow Metro LLP* [2009] CSOH 71, para [18] per Lord Hodge.

¹³ For the view that this is not clear-cut, see DJ Carr *Ideas of Equity* (2017) ch 3 especially paras 3-92 - 3-100, 3-109.

¹⁴ There may also be, for example, a public policy string to equity’s enrichment bow. But the courts cannot fire off decisions however they wish: *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 237, per Lord Clyde.

¹⁵ *Compagnie Commerciale Andre SA v Artibell Shipping Company Ltd (No 2)* 2001 SC 653, para 23, per Lord Macfadyen; *Corrie v Craig* unreported 31 October 2012 (Sh Ct, Kirkcudbright), 2013 GWD 1-55, para 16, per Sheriff Brown; *McVicar v The Keeper of the Registers of Scotland* [2014] CSOH 61, para [10], per Lord Doherty (noting common ground between the parties). See also *Credit Lyonnais v George Stevenson & Co Ltd* (1901) 9 SLT 93, 95, per Lord Kyllachy.

¹⁶ *AG v John Gunn*, para [61].

¹⁷ *AG v John Gunn*, para [62].

reasonable person were to consider the circumstances of the present case and ask who should in fairness bear the loss I think that the response given by him or her would be the taxing authority responsible for what had happened. [...] When considerations of equity fall to be applied I am of the view that they are plainly in favour of the first defender [...].

Let us first look at the general approach to unjustified enrichment here, before the second quoted passage on equity. The defender's enrichment was an expense saved. It was unjustified because, though a statutory regime spared John Gunn the levy, it was unlawful, as confirmed by the European Commission's decision. That the enrichment was an expense saved between two parties leads to the question of what kind of enrichment claim was in issue.¹⁸ In a three party case, there could still be a real transfer where, for example, A pays B's debt to C, saving B that expense. That is not so here, and this points against the better-established and more specific *condictiones*. As to enrichment by imposition, the Crown did not pay John Gunn's debt. The exemption meant that there was no debt to be paid. Moreover, the Crown did not interfere with John Gunn's property rights by sparing its expenditure on the levy.

None of this was addressed in *John Gunn*. Aversion to analysis is now a slight but damaging trend in Scots enrichment cases. It is incorrect "that one should focus on the principle rather than the categories, either of causes of action or of remedies".¹⁹ In confirming that slavish adherence to taxonomy is unnecessary, the cases indicate, or at least presuppose, that established categories – and so, previous *authorities* – will be examined to see if they are useful, before their gradual, careful relaxation.²⁰ Whilst judges "are no longer required to

¹⁸ The (mostly academic) basis on which the rest of this paragraph proceeds is summarised in n. 3. This structure is used for convenience and it is assumed that a search in the books under aforementioned headings would lead to relevant authority to assist interested parties.

¹⁹ *Pace Sheriff Brown in Corrie v Craig* unreported 31 October 2012 (Sh Ct, Kirkcudbright), 2013 GWD 1-55, para 20.

²⁰ *Mactaggart & Mickel Ltd v Hunter* [2010] CSOH 130, para [99], per Lord Hodge; *Lyon and Turnbull Ltd v Sabine* [2012] CSOH 178, para [24], per Lord Brodie; *Fife Scottish Omnibus v Tay Bridge Joint Board* unreported 12 June 1997 (IH, Ex Div), 1997 GWD 23-1180, [1997] Lexis Citation 582, p13 of transcript, per Lord Prosser, with whom Lord Cameron generally agreed, p5. See also *Kommissaris van Binnelandse Inkomste v Willers* 1994 (3) SA 283 (AD), 332-333, per Botha JA, for the Court; *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA), 488 *in principio*, 489 *in principio*, Schutz JA, with whom Olivier and Cameron JJA agreed; *Kudu Granite Operations (Pty) Ltd v Caterina Ltd* [2003] ZASCA 64, 2003 (5) SA 193, paras 15-17, per Nvasa JA and Heher AJA, for the Court. The tendency to generalise in a sister jurisdiction of Scotland's, South Africa, is evident in the cases cited, and removes the need always to start with an established *condictio*. But, as Moeng AJ explained in *SSI/Tshepega Joint Venture v MEC: Free State Provincial Government: Department of Police, Roads and Transport* [2015] ZAFSHC 4, paras 14-16, "[t]he current situation [...] entails that *ad hoc* extensions are utilised in a careful broadening of the actions of the common law, unless the facts of the matter are on all fours with the requirements of a classic action".

shoehorn the facts into a particular style of Roman sandal before the remedy [can] be made to fit”,²¹ the law cannot be allowed to run away with itself. Should established rules not be determinative, care is required in deciding the merits of a given case. Unfortunately, no such consideration was given here before ready reliance on what was probably a *condictio sine causa specialis*.

What of Lord Uist’s absolution of the defender based on equitable considerations, despite its unjustified enrichment at the Crown’s expense? His Lordship clearly took a discretionary approach (“who should in fairness bear the loss”). This is neither new,²² nor encouraging. Discretions in enrichment law are generally bounded.²³ The one exercised here was not. Administering equity does not mean deciding according to a personal sense of fairness,²⁴ and, as the Supreme Court has recently noted: “[a] claim based on unjust enrichment does not create a judicial licence to meet the perceived requirements of fairness on a case-by-case basis”.²⁵ This is what his Lordship did. The specific authorities addressed above have clarified the role of equity as an answer to enrichment claims. This went unnoticed. It should not surprise that proper defences must be raised before rights are extinguished.²⁶ Seen in that light, Lord Uist’s approach here is regrettable.

C. CONCLUSION

On the facts, the defender was plainly enriched at the pursuer’s expense: the *former* was spared outlay on the levy, which transpired to be due to the *latter*. This was unjustified, since the regime under which the exemption was obtained was illegal. However, it would have been reassuring had the Court shown itself aware that this was not a run-of-the-mill enrichment claim, and that only the most general – and so, potentially unruly – of enrichment

²¹ *Esposito v Barile* 2011 Fam LR 67 (Sh Ct, Tayside) para [17], per Sheriff Way.

²² See *MacKays Stores Ltd v Toward Ltd* [2008] CSOH 51, para [28], per Lord Drummond Young: “even if the requirements of the *condictio indebiti* were satisfied, the result would be unfair to the defenders”; noted critically by R Evans-Jones, (2008) 12 Edin LR 429.

²³ As with the discretion to relax the *par delictum* rule of the *condictio ob turpem vel iniustam causam*, the exercise of which, whilst the courts have been reluctant to fetter it, requires examination of the facts (*Klokow v Sullivan* [2005] ZASCA 99, 2006 (1) SA 259, paras 24-28, per Cachalia JA, for the Court) and is subject to rules. See, eg, the approach in *Afrisure CC v Watson NO* [2008] ZASCA 89, 2009 (2) SA 127, paras 39-47, per Brand JA, for the Court.

²⁴ Lord Kames, *Principles of Equity* (3rd edn, 2013 reprint [1778]) I, 19-21.

²⁵ *Revenue and Customs v Investment Trust Companies* [2017] UKSC 29, [2017] 2 WLR 120, para [39], per Lord Reed, for the Court. See also the earlier words of Lord Clyde: “The principle of unjust enrichment is equitable in the sense that it seeks to secure a fair and just determination of the rights of the parties concerned in the case”, but is not “entirely discretionary [...] so as to enable a court in any case to withhold a remedy where all the necessary elements for its satisfaction have been established”: *Banque Financière* [1999] 1 AC 221, at 237.

²⁶ Like change of position: *Alliance Trust Savings Ltd v Currie* [2016] CSOH 154, paras [38]-[42], per Lord Tyre. The term “defence” is used broadly here to designate answers to claims. See further A Dyson et al (eds), *Defences in Unjust Enrichment* (2016).

actions was applicable. The only possible defence to the pursuer's enrichment claim would appear to have been change of position. Sparse facts aside, this would almost certainly not have availed the defender, contrary to European Union competition law.²⁷ It is submitted that Lord Uist's holding on unjustified enrichment was incorrect.

More generally, a structured approach to unjustified enrichment is desirable, and equity in this area is unsatisfied by unrestrained discretion to ignore conditions of liability. These points are uncontroversial. The courts must ensure that the principles are applied in enrichment claims. Otherwise, cases may be wrongly decided. The sole cause of the right result here was the other law and argument going the pursuer's way.

Mat Campbell
University of Glasgow

²⁷ See, setting out, describing, and analysing treaty provisions, the Commission documentation, and their effects, at *AG v John Gunn*, paras [2]-[3], [6]-[7], [36]: "What a recipient of State aid did or did not do with the financial benefit gained from the application of an unlawful exemption is immaterial as far as the [European] Commission is concerned." See also Joined Cases C-164/15 P and C-165/15 P *European Commission v Aer Lingus and Ryanair* ECLI: EU:C:2016:990, para 102.